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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 560

ARNOLD CONSTABLE CORPORATION,
Petitioner,

v.

EUDOWOOD SHOPPING PLAZA, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent's Brief in Opposition fails to refute the overwhelming showing made by Petitioner that the Maryland Court of Appeals has unconstitutionally closed its doors to Petitioner.

The following propositions are entirely undisputed:

1. Petitioner was required under Maryland law to proceed through the agency of the lower court clerk (Superior Court of Baltimore City) in causing the Record on Appeal to be transmitted to the Maryland Court of Appeals at Annapolis. That forum is the court of last resort in the

State of Maryland, there being no intermediate appellate level (Maryland Rule of Procedure 825, Pet. App. p. 1a).

2. It is the function of the clerk of the lower court to transmit the record, and no other person has the power to do so.

3. The record was lodged with the clerk of the lower court (Frank N. Ensor, see Pet. App. C, p. 6a) in time for timely transmittal to the Maryland Court of Appeals either by hand delivery or mailing.

4. Mr. Ensor, Assistant Chief Clerk of the Superior Court of Baltimore City, adopted neither course, but waited until the following day so that his messenger could hand deliver this and another case record together, and "kill two birds with one stone". This method employed, through no fault of Petitioner, boomeranged and has this far operated to kill Petitioner's appeal.

Respondent's opposition brief seeks to stifle Petitioner's access to the Maryland Court of Appeals by focusing upon the second order issued out of the Baltimore Superior Court, which extended Petitioner's time to cause transmittal of the record under Rule 825(b) of the Maryland Rules of Procedure (Pet. App. 2a). Respondent appears to argue (opposition brief, pp. 2, 6) that because Petitioner's counsel did not prevent the lower court from entering an order of extension three days in excess of the ninety day interval prescribed by the Maryland Rules, Petitioner's rights of appeal have been constitutionally snuffed out. This argument is untenable under constitutional principles thoroughly established under the Fourteenth Amendment.

Petitioner, a corporation foreign to the State of Maryland, has been denied "the equal protection of the laws" within the meaning of the Fourteenth Amendment since other litigants (similarly situated as Petitioner in falling

victim to the default or miscarriage of Maryland lower court clerks have been regularly granted relief and their appeals have been heard on the merits (see Pet., p. 7).

Respondent has entirely misapprehended the thrust of Petitioner's argument with respect to denial of equal protection. Whereas " 'The Equal Protection Clause' requires more of state law than non-discriminatory application within the class it establishes," *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966) (cited by Respondent Brief, p. 4), it surely does not require less. The law must be evenly applied to all similarly situated persons, and the class itself must be rationally and fairly established. *McLaughlin v. State of Florida*, 379 U.S. 184, 191 (1964). Petitioner does not contend that the Maryland Rules, in and of themselves, have withheld equal protection of the laws of Maryland from Petitioner; rather Petitioner does urge that the application of such rules in this case has resulted in a discriminatory, and therefore unconstitutional, denial of equal protection. The constitutional test which Petitioner invokes is well expressed in *Republic Pictures Corp. v. Kappeler*, 151 F. 2d 543, 547 (8th Cir. 1945), *aff'd*, 327 U.S. 757 (1946), reh. den. 327 U.S. 817, as follows:

> "Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the court for relief under like conditions and without discrimination."

This is the standard under which the treatment of Petitioner by the courts of Maryland must be measured under the Fourteenth Amendment, and is to be found wanting in this case. See also, *Swick v. Glenn L. Martin Co.*, 68 F. Supp. 863 (D. Md. 1946), *aff'd*, 160 F. 2d 483 (4th Cir. 1947), cert. den., 332 U.S. 772 (1947).

While Respondent struggles to reapportion the blame for the default of the lower court clerk so as purportedly

to include Petitioner's Maryland counsel and their supposed role in obtaining the second extension order from the lower court judge who signed the order (regardless of who submitted it), the real and only damage is being inflicted upon Petitioner itself, who all must agree is entirely blameless. Respondent twice misstates (Brief, p. 6) the burden imposed upon Petitioner ("appellant") by Rule 825(d) of the Maryland Rules of Procedure, as requiring a demonstration that the one day delay in transmitting the record was "solely as the result of the negligence of the Court Clerk." This introduction of "solely" is simply a gloss upon the Rule, added gratuitously by Respondent; the Rule itself contains no such explicit requirement. Thus, even if it be the cumulative errors below, which have thus far deprived Petitioner of its substantial rights of appeal, such error lies wholly within the judicial machinery of the State of Maryland.

The merits of Petitioner's appeal were presumed by the Maryland Court of Appeals under its practice and at the present juncture its appeal from the substantial judgment cannot be heard. This miscarriage of justice is a denial of equal justice under law. As the district court so aptly expressed it in *U. S. v. First Nat. Bank & Trust Co. of Lexington, Ky.*, 280 F. Supp. 260, 263 (E.D. Ky. 1967) (previously considered and remanded at 376 U.S. 665 (1964)):

> "*Equal justice under law* means that any court action, whether civil or criminal, should be a satisfying experience to each litigant; not that each litigant would be satisfied with the results, but *satisfied that his rights have been thoroughly and objectively considered.*" (Italics added.)

Surely it cannot be said that Petitioner herein, whose appeal has been so unfairly and summarily dismissed, has received equal justice under law, where its rights have not

even been heard, much less "thoroughly and objectively considered".

Of course, denial of equal justice under law, or what is the same thing, equal protection of law, can also result, as is the situation herein, in denial of due process of law. As the Court held in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954):

> "But the concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive."

CONCLUSION

The dismissal of Petitioner's appeal, because of the miscarriage of the judicial establishment of the State of Maryland, and through no fault of Petitioner, has resulted in the denial to Petitioner of equal protection of law, and due process of law.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

NORMAN P. RAMSEY,

Counsel for Petitioner.